Federal Court of Appeal | Cour d'appel fédérale

Date: 20161114

Dockets: A-485-14
A-25-15

Citation: 2016 FCA 279

CORAM: **GAUTHIER J.A.**
BOIVIN J.A.
GLEASON J.A.

BETWEEN:

TPG TECHNOLOGY CONSULTING LTD.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on October 26, 2016.

Judgment delivered at Ottawa, Ontario, on November 14, 2016.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: GAUTHIER J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] TPG Technology Consulting Ltd. (TPG) appeals and Her Majesty The Queen (the Crown) cross-appeals from the October 2, 2014 judgment of the Federal Court issued by Justice Zinn, dismissing TPG's action for damages: *TPG Technology Consulting Ltd. v. Canada*, 2014 FC 933, 245 A.C.W.S. (3d) 840 (Reasons). TPG also filed a separate costs appeal of the Federal

Court's costs award in *TPG Technology Consulting Ltd. v. Canada*, 2015 FC 14, 249 A.C.W.S. (3d) 274. The two appeals were consolidated for hearing.

[2] For the reasons that follow, I would dismiss both appeals and the cross-appeal and would award the Crown a single set of costs in the amount agreed upon by the parties.

I. Background and the Decision of the Federal Court

[3] TPG's action against the Crown stemmed from the award by Public Works and Government Services Canada (PWGSC) to CGI Group Inc. (CGI) of a multi-year contract to provide engineering and technical support services to federal government departments and other governmental users. TPG was the incumbent and had previously provided such services under the predecessor contract. It lost the right to continue to do so following the procurement process that gave rise to its action. In TPG's Fresh Amended Statement of Claim, it claimed damages for the breaches of contract that it alleged had been committed by the Crown in the procurement process. It did not seek any other remedies, apart from interest and costs.

[4] The Federal Court heard the case over the course of 25 days, during which thousands of pages of documentary evidence were filed and the testimony of 19 witnesses, including several experts, was heard. The Federal Court dismissed TPG's claim because it determined that it more properly ought to have been made to the Canadian International Trade Tribunal (CITT). Although the Court did find that a breach of contract had occurred, it held that TPG failed to prove that it suffered any compensable damage as a result of this breach.

[5] The Crown raised the jurisdictional objection in its pleadings. In its Fresh as Amended Statement of Defence, the Crown pleaded that the Federal Court lacked jurisdiction to hear the action as its subject matter fell within the exclusive jurisdiction of the CITT. TPG, for its part, argued that the jurisdictional point had been settled in its favour by an earlier ruling made on the Crown's summary judgment motion, where the Federal Court (per Justice Near) had ruled that TPG's claim, as then constituted, did not fall within the exclusive jurisdiction of the CITT: *TPG Technology Consulting Ltd. v. Canada*, 2011 FC 1054 at para. 45, 340 D.L.R. (4th) 151 [*TPG FC*], reversed on other grounds in *TPG Technology Consulting Ltd. v. Canada*, 2013 FCA 183, 363 D.L.R. (4th) 370 [*TPG FCA*].

[6] By the time the matter was argued before the Federal Court, the Crown had altered its position on the jurisdictional point and conceded that the Federal Court possessed concurrent jurisdiction over TPG's claim. However, it argued that the Court should decline to exercise such jurisdiction as the matter ought to have proceeded before the CITT. Despite this, the Crown made no motion to have the case dismissed on jurisdictional grounds, and the jurisdictional argument was only addressed by the Federal Court in its final decision.

[7] On this issue, the Federal Court held that the ruling in *TPG FC* did not settle the question of the Federal Court's jurisdiction over TPG'S claim as TPG had amended its claim subsequent to that ruling and had narrowed the claim to assert only that the Crown had breached the contract governing the conduct of the procurement process (typically called "Contract A" in the case law) due to unfairness in that process and by accepting a non-compliant bid. The ruling made by

Justice Near had dealt with a much different claim, in which TPG had also alleged tortious conduct by the Crown.

[8] The Federal Court determined that jurisdiction over the subject matter of TPG's action was concurrent with both the Federal Court and the CITT possessing jurisdiction, but that it should decline to exercise its jurisdiction. The Federal Court reasoned that the matter ought to have proceeded before the CITT as opposed to the courts in light of both the nature of TPG's amended claim and the comprehensive nature of the remedial process before the CITT, which the Federal Court held was capable of addressing such a claim (Reasons at paras. 69, 78, 93, 100-103, 107-108).

[9] Despite determining that it should decline jurisdiction, the Federal Court nonetheless went on to exhaustively consider the case on the merits and found that TPG had not made out its case for damages. In so holding, the Federal Court reached four conclusions that are relevant to these appeals and cross-appeal.

[10] First, the Federal Court held that the Crown owed and breached its duty of fairness to TPG because the evaluators who assessed the competing bids adjusted the way in which they applied two of the evaluation criteria (criteria 3.3.3 and 3.3.5) to TPG and another bidder, but there was no clear evidence to show that the same adjustment had been made for CGI (Reasons at paras. 125-127).

[11] Second, the Federal Court found that TPG failed to establish unfairness in respect of any of the other evaluation criteria or in the overall conduct of the bid process (Reasons at paras. 144-146). There were 217 criteria in total against which bids were evaluated, but TPG challenged only nine of them. The Federal Court held that the evidence did not support TPG's assertion that the Crown unfairly evaluated the seven other criteria that TPG challenged and, indeed, held that there was not even a principled basis for TPG to have suggested any unfairness in respect of these seven other impugned criteria (Reasons at paras. 149-151). The Federal Court further rejected TPG's assertion that the Court should find the entire process to have been unfair merely because TPG had shown there to be unfairness in the assessment of two of the 217 criteria under which the competing bids were assessed (Reasons at paras. 146, 151).

[12] TPG argued in this regard that the comments made by this Court in *TPG FCA* at paragraph 10 to the effect that if sections 3.3.3 and 3.3.5 of the Request for Proposal (RFP) were unfairly evaluated, "it is probable that the entire bid was unfairly evaluated" meant that the Federal Court was bound to conclude that TPG had established unfairness in the entire process once it established that criteria 3.3.3 and 3.3.5 had been unfairly evaluated. The Federal Court disagreed in light of the fact that, in making these comments in *TPG FCA*, this Court was ruling on a summary judgment motion and thus decided only if there was sufficient evidence for the matter to proceed to trial, as opposed to deciding the issue on the merits. The Federal Court also noted that the evidence before it was different from that which had been before this Court in *TPG FCA* as TPG had not called the expert witness to testify at trial who had opined on the unfairness in the bid assessment process in an expert report filed on the summary judgment motion (Reasons at paras. 147-148).

[13] Third, the Federal Court concluded that the breach of the duty of fairness in respect of bid criteria 3.3.3 and 3.3.5 did not give rise to any compensable damages as the impugned criteria scores were numerically inconsequential. More specifically, the Court found that even if TPG had received full marks for these criteria, CGI's bid would still have been the highest-rated (Reasons at para. 146).

[14] Fourth, the Federal Court held that TPG had not established that CGI's bid was non-compliant (Reasons at paras. 175, 180, 195, 212). TPG's assertion of CGI's non-compliance turned on the mandatory criterion set out in section A. 24 of the RFP. It provides as follows:

> A. 24 Status of Resources:
>
> By submitting a proposal, the Bidder is certifying that either:
>
> (i) all the individual resources proposed are employees of the Bidder; or
>
> (ii) in the case of any individual proposed who is not an employee of the Bidder, the Bidder is certifying that it has written permission from such person (or the employer of such person) to propose the services of such person in relation to the work to be performed in fulfillment of this requirement and to submit such person's résumé to the Contracting Authority in connection with this solicitation. During the bid evaluation, the Bidder must upon the request of the Contracting Authority provide a copy of such written permission, in relation to any or all non-employees proposed. Failure to comply with such a request may lead to disqualification of the Bidder's proposal.

[15] TPG took the position that this provision required bidders at the time of the bid to have engaged all of the resources required to perform services under the RFP. TPG argued that CGI had failed to meet this requirement because it had not engaged such resources by this time and,

indeed, had improperly centred its bid on the plan to recruit TPG's personnel who had been performing services under the predecessor contract.

[16] TPG also asserted that CGI had failed to provide the requisite resources by the transition time, as required by the RPF, and that at the time of the contract award the Crown knew CGI would not be able to do so. TPG therefore asserted that the Crown had knowingly accepted a non-compliant bid. TPG premised its case on these points on the fact that it had obtained contractual commitments from its existing subcontracted personnel and employees that purported to prevent them from providing resources to assist competitors during and for some period of time following the tendering process (Appeal Book, Vol. 10 at pages 3084-3089).

[17] The Federal Court rejected these arguments.

[18] On the contractual interpretation issue, it held that section A. 24 of the RFP did not oblige a bidder to establish that it had engaged or hired any more than 10 of its resources as of the date of its bid, but instead only required a bidder to establish that it had the corporate capacity to engage the other required resources by the time it would be called upon to provide their services. In so concluding, the Federal Court thoroughly reviewed the voluminous RFP, its evaluation criteria matrix as well as PWGSC's answers to some of the 206 questions posed by the bidders (Q & As), which form part of the RFP (Reasons at paras. 162-163, 166-175).

[19] On the assertions that TPG had breached the requirement to have engaged the required resources by the time of transition and that the Crown knew that CGI would not be able to do so, the Federal Court found that there was no failure by CGI to have the required resources in place by the end of the transition period (Reasons at para. 212). The Federal Court determined that the

RFP and several of the Q & As established that the transition period required by the RFP was fluid and was to take place gradually; the Federal Court determined that the transition period in fact had stretched from December 22, 2007 to March 28, 2008 (Reasons at paras. 207-212). Finally, the Federal Court held that there was no evidence that the Crown knew that CGI would not be able to provide the required resources by the end of the transition period and held that the above-detailed terms that TPG had obtained from its existing personnel did not prevent CGI from including a proposal to recruit these individuals as part of its bid (Reasons at paras. 164-166, 196-198).

[20] In terms of costs, the Federal Court ordered TPG to pay costs, inclusive of disbursements, in the amount of $611,303.16. This amount was based on Column IV of the *Federal Courts Rules*, SOR/98-106, Tariff B [the Tariff], which the Federal Court found appropriate in light of the success of the Crown, the complexity of the issues and a settlement offer in which the Crown had offered to settle by having the action dismissed without costs.

II. The Positions of the Parties

[21] In its appeal, TPG submits that the Federal Court erred on the jurisdictional issues and also in its assessment of the merits of TPG's claim. In some instances, the arguments made by TPG in support of its appeal were not made to the Federal Court or asserted in TPG's Fresh Amended Statement of Claim. In addition, as is more fully discussed below, although TPG casts the errors that it alleges the Federal Court made in assessing the merits of its case as being errors of law, in some respects TPG seeks to have this Court reach conclusions that would require setting aside many of the factual determinations made by the Federal Court that TPG does not

contest. In other instances, TPG's arguments are premised on factual assertions that find no support in the Federal Court's findings.

[22] On the jurisdictional point, TPG argues that the Federal Court erred in failing to apply the doctrine of issue estoppel and in failing to find that Justice Near's ruling in *TPG FC* determined the jurisdictional argument in its favour. It argues in the alternative that the Federal Court erred in finding it should decline to exercise its jurisdiction, especially after having conducted a multi-day trial.

[23] In terms of the determinations made on the merits, TPG contests both the Federal Court's finding that TPG suffered no compensable damages and the Federal Court's finding that CGI's bid was non-compliant.

[24] As concerns its damages argument, TPG claims that, having found a breach of fairness in terms of criteria 3.3.3 and 3.3.5, the Federal Court ought either have required the Crown to re-do the bid process or ought to have ordered damages on a general basis for unfairness in the bid process. It further asserts that the holding of this Court in *TPG FCA* required the Federal Court to find the entire bid process unfair when it determined that the evaluators had unfairly applied criteria 3.3.3 and 3.3.5 to TPG. TPG also relies on several CITT decisions in support of the assertion that the Federal Court ought to have made a general damages award for unfairness in the bid process.

[25] TPG further submits that the Federal Court erred in law in its treatment of the breaches related to criteria 3.3.3 and 3.3.5. TPG argues that, in assessing whether TPG suffered compensable damages, the Federal Court should not have considered the impact of awarding TPG full points for these criteria but rather should have considered the impact of both awarding additional points to TPG for the two criteria and decreasing CGI's scores for these criteria. It claims that, had this occurred, its bid would have been the highest-rated. However, as is more fully discussed below, it called no evidence in support of this assertion and did not even put it in cross-examination to the Crown witness, Robert Tibbo, who testified as to the impact of various different rating scenarios. Moreover, it appears that this assertion was not put to the Federal Court as an alternative for the Court to consider and was not ever mentioned in the Fresh Amended Statement of Claim even though TPG there posited several other rating scenarios.

[26] On the contract interpretation issues, TPG asserts that contract interpretation is a matter of law and cites in support of this position case law that has been overtaken by the decisions of the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 [*Sattva*] and *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, 269 A.C.W.S. (3d) 753 [*Ledcor*]. It erroneously asserts that the Federal Court's interpretation of the RFP is reviewable on the correctness standard. TPG further argues that the Federal Court erred in its interpretation of the RFP because it improperly ignored Q & A 120, which provides:

> Question 120:
>
> […]
>
> If the selected bidder is unable to deliver required resources that meet the mandatory qualifications identified in Part III of the Statement of Requirements at

> the time of contract award or at the time of transition, will the contract be terminated at that point?
>
> Answer 120:
>
> Yes.

[27] TPG argues that the foregoing Q & A gave rise to a contractual commitment to bidders that the Crown would terminate the contract if the selected bidder were unable to deliver the required resources at the time of contract award or at the time of transition and that such commitment formed part of Contract A. TPG submits that this Q & A required a bidder to have all its resources in place at the time of contract award. It further says that this clause was breached as CGI did not have its resources in place by that date or by the transition date. However, TPG has not contested the Federal Court's findings as to the character and length of the transition period. Nor does it contest the Federal Court's factual determination that CGI had all the required resources in place by the end of the transition period.

[28] In terms of the damages it seeks on appeal, TPG clarified that although it requested an award of damages from this Court in the amount of $250,000,000.00, the quantum of damages it could claim to have established at trial ranged only from $300,000.00 to $12,000,000.00. It thus seeks this Court to make an order in this range.

[29] Finally, in terms of its costs appeal, TPG confirmed during argument that it filed this second appeal out of an abundance of caution and seeks merely to have the costs award against it overturned in the event it is successful in its appeal on the merits, in which event it seeks a costs

award in its favour under Column III of the Tariff. No separate materials were filed on the costs appeal.

[30] For its part, in its cross-appeal, the Crown seeks to vary the Federal Court's judgment from one that dismissed the appeal with costs to one that provides that "[t]he action for breach of contract is dismissed in its entirety on all grounds, including that [TPG's] bid was fairly and equitably evaluated and there was no breach of Contract A". As counsel for the Crown conceded during the hearing of this appeal, this cross-appeal seeks to appeal the portion of the Reasons with which it takes issue. However, no appeal lies from a court's reasons, but, rather, only from its judgment or order: *Teva Canada Ltd. v. Canada (Minister of Health)*, 2012 FCA 106 at paras. 43-46, 214 A.C.W.S. (3d) 587; *Froom v. Canada (Minister of Justice)*, 2004 FCA 352 at para. 11, [2005] 2 F.C.R. 195. Thus, as the Crown conceded, the cross-appeal should be dismissed as irregular but its supporting arguments may be considered as part of the Crown's response in the event this Court decides to intervene in respect of the Federal Court's finding that TPG failed to prove that it suffered damages. As I have concluded that TPG's appeal should be dismissed, there is no need to consider the arguments made by the Crown in its cross-appeal.

III. Analysis

[31] Turning to the appellant's appeal, as the Federal Court effectively took jurisdiction and decided the case on the merits, I see no need to rule on the issue estoppel or jurisdictional arguments advanced by the appellant, other than to note that I agree with the Federal Court that there is concurrent jurisdiction between it and the CITT over the issues raised in TPG's claim.

[32] The jurisdiction of the CITT over such claims has already been recognized by this Court in *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2001 FCA 241 at paras. 20-24, 202 D.L.R. (4th) 610. Likewise, the jurisdiction of the courts to adjudicate breach of contract claims, including that of the Federal Court where the claim is made against the federal Crown, cannot be contested. Indeed, claims for breaches of Contract A in a procurement process have been the subject of actions before courts: *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69; *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3, [2007] 1 S.C.R. 116; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, 170 D.L.R. (4th) 577 [*M.J.B.*].

[33] It is unnecessary in this case to go further and decide when, if ever, it might be appropriate for the Federal Court to decline to exercise its jurisdiction in favour of the CITT in light of the determination I have reached on the appeal from the Federal Court's decision on the merits. That said, I should not be taken as endorsing the way in which the Federal Court proceeded in this case in deciding the jurisdictional issue at the end of a lengthy trial as opposed to at the outset of the process.

[34] As concerns the merits, I turn first to TPG's arguments challenging the Federal Court's conclusion that the breach of the duty of fairness did not give rise to any damages.

[35] The argument that the Federal Court ought to have found a generalized breach of the duty of fairness by reason of this Court's decision on the summary judgment motion in *TPG FCA*

must be dismissed for essentially the same reasons as given by the Federal Court as the decision in *TPG FCA* cannot be read to infer any presumption in favour of TPG. The brief comments made in paragraph 10 of the *TPG FCA* decision on which TPG relies are simply *obiter* made in the context of an appeal of a summary judgment motion, where TPG had the evidentiary burden of putting forward evidence showing that there was a genuine issue for trial. Accordingly, this Court was not tasked with deciding the issue on the merits; nor did it have before it the same evidentiary record that was before the Federal Court at trial. Thus, contrary to what TPG argues, this Court's *obiter* comments do not mean that TPG is entitled to damages merely by showing unfairness in relation to the two disputed evaluation criteria.

[36] As concerns the assertion that TPG was entitled to damages for lack of integrity in the bid process or to an order for the re-conduct of that process in the same way as might be granted by the CITT, quite apart from the lack of legal authority in support of such assertions, neither remedy was sought by TPG from the Federal Court or in TPG's Fresh Amended Statement of Claim. TPG therefore cannot seek these remedies on appeal or claim that the Federal Court erred in refusing to grant them. Rather, its claim was limited to a claim for damages flowing from the alleged breach of Contract A.

[37] In determining that TPG had not established any damages flowing from such breach, the Federal Court applied the correct legal principles. In the procurement context, damages are assessed on general contractual principles (see for example *Martel Building Ltd. v. Canada*, 2000 SCC 60 at para. 102, [2000] 2 S.C.R. 860 [*Martel*]; *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58 at para. 73, [2001] 2 S.C.R. 943; *M.J.B.* at para. 57; *Canada (Attorney*

General) v. Envoy Relocation Services, 2007 FCA 176 at para. 29, 361 N.R. 367). It is a well-established principle of contract law that a plaintiff bears the burden of establishing a loss on the balance of probabilities to prove damages (see *Pfizer Canada Inc. v. Teva Canada Ltd.*, 2016 FCA 161 at para. 55, 483 N.R. 275, relying on *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324, 5 N.R. 99). This is consistent with the Supreme Court of Canada's decision in *Martel*, where, despite having found a breach of Contract A, the Court found that the bidder was not entitled to damages since Martel's bid would still have lost even if the breach had not occurred (*Martel* at para. 102). Accordingly, for TPG to prove a loss, it was required to demonstrate, on a balance of probabilities, that it would have won the bid had the breach not occurred.

[38] Given that TPG led no evidence to prove that PWGSC unfairly evaluated any of the other criteria in the RFP besides criteria 3.3.3 and 3.3.5, despite having the benefit of discovery and of a trial during which it had the opportunity to cross-examine the five evaluators, it is my view that the Federal Court did not make any palpable and overriding error in finding that TPG had only established a breach of these two criteria.

[39] Additionally, I see no error in the way in which the Federal Court evaluated the impact of the breach of these two criteria. The Crown called evidence to show the impact of neutralizing the two criteria through the testimony of Robert Tibbo. His evidence demonstrated that even if TPG had been awarded full marks for these criteria, CGI's bid would still have been the highest rated. Mr. Tibbo also testified as to the impact of several rating alternatives raised by TPG in its Fresh Amended Statement of Claim, demonstrating that none of them would have resulted in TPG being awarded the contract. There is a complete lack of evidentiary foundation for TPG's

suggestion that the Federal Court erred in failing to assess the impact of the breach of criteria 3.3.3 and 3.3.5 by both reducing CGI's score for the criteria and also increasing TPG's score to 100% in respect of them. In light of the complete lack of evidence to support this assertion – and the fact that it was not advanced before the Federal Court – the Federal Court most certainly did not err in failing to consider this scenario.

[40] Moreover, I see no basis in logic for TPG's assertion that its scores should have been increased while CGI's scores should have been decreased. The evidence showed that the bids of TPG and the third bidder had been reassessed for criteria 3.3.3 and 3.3.5 while CGI's might not have been. The consensus scores for TPG and the other bidder were less than the average of the individual evaluators' scores, while CGI's consensus scores did not decrease in the same way. In such circumstances, it seems to me that the impact of the unfairness in evaluating the two criteria may be neutralized by giving all bidders either full marks or no marks for the two criteria. Giving full marks to some bidders while reducing the scores of other bidders is not appropriate as this would result in the scores for the impugned criteria being weighted in a disproportionate manner. Indeed, as noted by the Supreme Court of Canada on a similar point in the context of a discrepancy in the financial evaluation criterion at issue in *Martel*, the proper methodology for assessing the impact of the breach was to ensure that either all bids or no bids included the item at issue (*Martel* at para. 102).

[41] I therefore do not believe that the Federal Court committed any reviewable error in the way in which it evaluated the impact of the unfairness in respect of criteria 3.3.3 and 3.3.5 or in

its determination that such unfairness did not give rise to any compensable damages suffered by TPG.

[42] I now turn to TPG's arguments concerning the alleged non-compliance of CGI's bid. Its assertion that the Federal Court's interpretation of the RFP is reviewable on the correctness standard must be dismissed as the Supreme Court of Canada has held that interpretation of a contract like the RFP is a matter of mixed fact and law and therefore reviewable on the palpable and overriding error standard: *Ledcor* at paras. 24-26: *Sattva* at paras. 47, 50, 57; *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 26-37, [2002] 2 S.C.R. 235.

[43] I see no error – much less a palpable and overriding one – in the way in which the Federal Court interpreted the section A.24 requirement in the RFP. There was no need for the Federal Court to have specifically mentioned Q & A 120 when interpreting what the RFP obliged in respect of when the required resources were to be in place. This Q & A says nothing about what these requirements are and speaks instead to the impact of a breach of them. Rather, the relevant provisions for determining what the RFP required were those noted by the Federal Court, and include the provisions regarding transition and Q & As 12, 61, 141 and 170. Q & A 170 reads as follows:

> Question 170:
>
> […]
>
> This response now requires the successful bidder to prepare resumes and related grids for 145 resources within 5 days of contract award. This is a new requirement, and an unrealistic request that favors the incumbent. In the interest of starting the project in a manner that allows both parties to succeed, we suggest that the Amendment 4 Question 42 and Amendment 9

> Question 82 requirements be removed. This will allow for the focus to be on the Transition plan in the first few days rather than just on naming resources.
>
> Answer 170:
>
> The Bidder is to provide resumes for all 145 resources and submit the resumes with their finalized transition plan, which is within 10 days of contract award. Each resume proposed will be evaluated against the classification requirements detailed in Annex A Part III for each position. In order for Canada to properly evaluate the transition plan after contract award it is imperative that Canada be assured that the personnel performing the transition are qualified as per the classification requirements.
>
> [My emphasis.]

[44] These provisions all support the interpretation that the RFP required only that a bidder needed to establish that it had recruited 10 qualified resources by the time of the bid and that it had the corporate capacity to recruit the others by the end of the transition period. The Federal Court thus did not err in its interpretation of the requirements of the RPF.

[45] Even if one could read Q & A 120 as a promise by the Crown that it would terminate the RFP if the successful bidder did not have the required resources in place by the transition time as TPG now argues, the Federal Court found that CGI met its obligations in this regard as the transition period was extended by the Crown under the provisions in the RPF that allowed it to do so and all required resources were on board by the end of the transition period. TPG has not challenged these findings, which appear to be unassailable as they are grounded in the evidence (Appeal Book, Vol. 2 at pages 316-317 (RFP provision B.10.3); Appeal Book, Vol. 11 at pages 3535-3539; Appeal Book, Vol. 13 at pages 3971-3973).

[46] I therefore find that the Federal Court did not commit any reviewable error in its determination that TPG had failed to establish that CGI's bid was non-compliant. Thus, there is no basis to interfere with the Federal Court's conclusions on the merits of TPG's claim.

[47] Finally, there is no reason to disturb the Federal Court's costs award because TPG only seeks to overturn it in the event of its success on this appeal. In any event, I see no reviewable error in the way in which the Federal Court reached its costs assessment.

[48] It follows that I would dismiss these appeals and the cross-appeal. The parties agreed that costs should be fixed in the amount of $5,500.00, which I believe appropriate in light of the issues and volume of materials put before this Court. I propose that there be a single set of costs for the two appeals and the cross-appeal in favour of the Crown in the agreed-upon amount as in essence there really was only one appeal that was argued before this Court. Thus, I propose to dismiss the appeals and cross-appeal, with a single set of costs in favour of the Crown in the all-inclusive amount of $5,500.00.

"Mary J.L. Gleason"
J.A.

"I agree.
Johanne Gauthier J.A."

"I agree.
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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